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sued as "Institutional Trading Company") and IT.COM

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

KWONG YUNG,

Plaintiff,

v.

INSTITUTIONAL TRADING COMPANY, a  
corporation, IT.COM, a corporation, DOES 1  
to 10,

Defendant.

Case No. 07-CV-5949

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION TO  
DISMISS FOR LACK OF PERSONAL  
JURISDICTION PURSUANT TO  
F.R.C.P. 12(B)(2); MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Date: February 22, 2008  
Time: 10:00 a.m.  
Courtroom: 1, 17th Floor  
Judge: Honorable Samuel Conti

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**NOTICE OF MOTION AND MOTION**

**TO PLAINTIFF KWONG YUNG AND HIS ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE THAT on February 22, 2008, at 10:00 a.m., or as soon as this matter may be heard, in the courtroom of the Honorable Samuel Conti, United States District Court, 450 Golden Gate Avenue, San Francisco, CA 94192, defendants Institutional Trading Company and IT.com, will move the Court for an Order dismissing with prejudice Plaintiff Kwong Yung's Complaint for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. In the alternative, Defendants seek to transfer venue of this action to the United States District Court for the District of Columbia, pursuant to 28 U.S.C. § 1404(a). This motion is based on the Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the Proposed Order, the declarations of Mark A. Cordover and Michael D. Weil, the papers on file in this matter, and such other evidence and argument as the Court permits to be heard in this matter.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Defendants Institutional Trading Corporation ("ITC") and IT.com (collectively "Defendants"), hereby move pursuant to Federal Rule of Civil Procedure 12(b)(2), to dismiss Plaintiff Kwon Yung's ("Plaintiff") lawsuit for lack of personal jurisdiction. Plaintiff alleges four claims against Defendants all arising out his employment with defendant IT.com in Washington, D.C.: (1) breach of written agreement, whereby Defendants allegedly promised to employ Plaintiff for three years, but terminated him without cause; (2) unpaid wages for the month of December 2006; (3) conversion of a laptop computer that Plaintiff claims belonged to him; and (4) fraud relating to Defendants' alleged promise to employ Plaintiff for three years.

None of the events or evidence in this case have any connection to California, as all are centered around the Washington, D.C. area. For example:

- Defendants are Washington, D.C. corporations that do not conduct any business in

1 California;

- 2 • Mark Cordover, defendant IT.com's Chief Executive Officer, offered Plaintiff a job while
- 3 both were in Washington, D.C. (defendant ITC never employed Plaintiff);
- 4 • Mr. Cordover and Plaintiff negotiated the key terms of Plaintiff's agreement while both
- 5 were in Washington, D.C.;
- 6 • IT.com and Plaintiff intended for Plaintiff to perform his duties for IT.com in Washington,
- 7 D.C.;
- 8 • Plaintiff was employed in Washington, D.C. during the entire term of his employment
- 9 with IT.com and, in fact, performed his duties in Washington, D.C.;
- 10 • Plaintiff resided in the State of Virginia during the entire term of his employment with
- 11 IT.com;
- 12 • The decision to terminate Plaintiff's employment occurred in Washington, D.C.;
- 13 • IT.com actually terminated Plaintiff's employment while he was in Washington, D.C.; and
- 14 • At all times relevant, the laptop that Defendants allegedly converted was in Washington,
- 15 D.C.

16 California's only connection to this case is that is where Plaintiff resided before his job  
 17 with IT.com and that is where he resides today. This falls far short of satisfying the constitutional  
 18 protections of the due process clause in order to establish personal jurisdiction over an out-of-  
 19 state defendant. Plaintiff improperly brought this lawsuit in San Francisco for his own  
 20 convenience, nothing more. Accordingly, this Court should dismiss this case with prejudice.

21 In fact, on February 16, 2007, Plaintiff attempted to assert the same claims as in this  
 22 lawsuit in an administrative charge filed with the California Labor Commissioner at the Division  
 23 of Labor Standards Enforcement. However, on March 20, 2007, the Labor Commissioner  
 24 dismissed Plaintiff's administrative charge for lack of personal jurisdiction:

25 Mr. Yung does not have a sufficient basis to claim the protections  
 26 of California law and should look to the state of Virginia or the  
 District of Columbia for assistance in resolving this dispute.

27 See Declaration of Mark Cordover in Support ("Cordover Dec."), Exs. J & K. This Court should  
 28 likewise dismiss this lawsuit.

1 In the alternative, the Court should transfer the venue in this action to the United States  
2 District Court for the District of Columbia pursuant to 28 U.S.C. § 1404(a). California has no  
3 meaningful connection to this action and is not the proper forum to resolve it.

4 Defendants informally attempted to resolve the personal jurisdiction issue without motion  
5 practice by asking Plaintiff to dismiss this California action and re-file in Washington, D.C.,  
6 where this case belongs. Plaintiff refused, so Defendants were left with no choice but to file this  
7 motion.

## 8 **II. STATEMENT OF FACTS**

9 As demonstrated by the following facts, none of Plaintiff's claims belong in California  
10 because (a) this Court does not have general jurisdiction over defendants, (b) Defendants did not  
11 purposefully avail themselves of the benefits of California, and (c) none of Plaintiff's causes of  
12 action arise out of Defendants' conduct with California.

### 13 **A. ITC and IT.com Have No Presence In California.**

14 ITC is a privately held corporation, which was incorporated in the District of Columbia on  
15 October 27, 1983. Cordover Dec. ¶ 3. ITC has its principal place of business in the District of  
16 Columbia. *Id.*, ¶ 3. ITC has no offices in California. *Id.* ITC does not have an agent for service  
17 of process in California. *Id.* ITC does not lease or own real property in California. *Id.* ITC does  
18 not have any bank accounts in California. *Id.* ITC has no employees or officers residing in  
19 California. *Id.* ITC does not conduct any directors' meetings or other corporate activity in  
20 California. *Id.* At no time has ITC conducted business in California nor is ITC licensed to  
21 conduct business in California. *Id.* ITC has no clients in California nor does it have contracts  
22 with any California individual or entities. *Id.* ITC does not advertise in California. *Id.* ITC does  
23 not have a Web site accessible to California residents. *Id.* ITC does not have a telephone within  
24 California. *Id.* ITC is not, and has never been, engaged in any litigation in California besides the  
25 instant matter brought by Plaintiff and his related claim brought before the California Labor  
26 Commissioner. *Id.* ITC does not employ anyone, and did not employ anyone during Plaintiff's  
27 tenure, including Plaintiff. *Id.*

1 Like ITC, IT.com was incorporated in the District of Columbia on November 30, 2005.<sup>1</sup>  
 2 *Id.*, ¶ 5. IT.com maintains its principal place of business in the District of Columbia. *Id.*, ¶ 5.  
 3 IT.com is a vertical search engine company that helps technology buyers find the best solutions  
 4 available on the Web—objectively and comprehensively. *Id.* IT.com is not authorized to do  
 5 business in California. *Id.* IT.com has no offices in California. *Id.* IT.com does not lease or own  
 6 real property in California. *Id.* IT.com has no bank accounts in California. *Id.* IT.com has no  
 7 employees or officers residing in California. *Id.* IT.com does not have a telephone within  
 8 California. *Id.* IT.com does not advertise in California. *Id.* IT.com is not, and has never been,  
 9 engaged in any litigation in California besides the instant matter brought by Plaintiff and his  
 10 related claim brought before the California Labor Commissioner. *Id.* IT.com has no current  
 11 customers in California and has never had any customers in California. *Id.* IT.com has solicited  
 12 only three to four different entities in California to provide IT.com services, but has been  
 13 unsuccessful. *Id.*

14 **B. IT.com's CEO, Mark Cordover, Offered Plaintiff A Job And Negotiated The**  
 15 **Key Terms Of His Employment While Both Were In Washington, D.C.**

16 Plaintiff sought employment with IT.com when he responded to a job posting for a senior  
 17 scientist IT.com had placed exclusively on the Washington, D.C. site of Craig's List. *Id.*, ¶ 7.  
 18 The ad could only be accessed through <http://washingtondc.craigslist.org/>. *Id.* Mark Cordover,  
 19 IT.com's CEO, conducted a screening interview with Plaintiff over the phone while Cordover  
 20 was in his office in Washington, D.C. and Plaintiff was in California. *Id.* at ¶ 8. Plaintiff then  
 21 flew to Washington, D.C. for a formal interview with Mr. Cordover, which took place on or about  
 22 November 11, 2005. *Id.*

23 During the formal interview, Mr. Cordover offered Plaintiff a position with IT.com,  
 24 Plaintiff accepted, and they agreed to all of the key terms of his employment on that day. *Id.*  
 25 Over the next few weeks, Plaintiff and Mr. Cordover memorialized Plaintiff's employment terms  
 26 with IT.com through a couple of emails. *Id.* Mr. Cordover was in Washington, D.C. at all times  
 27 during these few weeks. *Id.* In particular, from his office in Washington, D.C., Mr. Cordover

28 <sup>1</sup> In late 2005, ITC transferred its trademark rights and other intellectual property to defendant IT.com. *Id.*, ¶ 4. ITC retained ownership of the domain name it.com. *Id.* That is the only relationship between ITC and IT.com.



1 sent Plaintiff an email on November 26, 2005 memorializing the terms of Plaintiff's employment  
2 with IT.com. *Id.* at ¶ 9. The email provided that Plaintiff was to begin work with IT.com on  
3 December 1, 2005, and that IT.com would pay for some of the expenses Plaintiff incurred in  
4 relocating to Washington, D.C. *Id.* at ¶ 10. In addition, the agreement provided that IT.com  
5 would pay Plaintiff for three business trips to California during 2006. *Id.*

6 **C. Plaintiff Worked and Resided in Washington, D.C. Throughout His**  
7 **Employment With IT.com.**

8 Plaintiff worked and resided in Washington, D.C. throughout his employment with  
9 IT.com. *Id.* at ¶¶ 11-17. On his first day of work – December 1, 2005 – Plaintiff reported to  
10 IT.com's offices in Washington, D.C. *Id.* at ¶ 17. On this same day, Plaintiff and IT.com entered  
11 into a Restricted Stock Agreement. *Id.* at ¶ 11. While Plaintiff may contend that he had a three-  
12 year employment contract with IT.com., the Stock Agreement provides, among other things, that  
13 in the absence "of an employment agreement, or of a provision in such an agreement to the  
14 contrary, Participant acknowledges that he is an employee at will." *Id.*, Ex. C, ¶ 5. The Stock  
15 Agreement also includes a provision that it shall be construed according to the laws of the District  
16 of Columbia. *Id.* at Ex. C, ¶ 12.

17 Also on his first day of work, Plaintiff filled out and signed an Employment Eligibility  
18 Verification Form, listing his address as Fairfax, Virginia. *Id.*, Ex. D. A week or so later,  
19 Plaintiff completed and signed a Form W-4 on which he also listed his address as Fairfax,  
20 Virginia. *Id.*, Ex. E. Throughout Plaintiff's employment, IT.com paid Virginia Income Tax  
21 Withholding for his wages and sent Plaintiff's W-2 forms to his Fairfax, Virginia address. *Id.* ¶  
22 14 and Ex. F. As part of his claim, Plaintiff alleges that IT.com failed to reimburse him for  
23 alleged business trips he had taken. When he sought reimbursement from IT.com, Plaintiff  
24 attached the reservation confirmation for two of the flights he allegedly took for business. Both  
25 confirmations list Plaintiff's billing address as Fairfax, Virginia. *Id.*, Exs. G, H.

26 Moreover, Plaintiff's office was located next door to Mr. Cordover's office, and Mr.  
27 Cordover personally observed Plaintiff working in his office in Washington, D.C., throughout his  
28 employment. *Id.*, ¶ 15. On many occasions, including weekends, Mr. Cordover drove Plaintiff

1 from IT.com's offices in Washington, D.C. to Plaintiff's home in Fairfax, Virginia. *Id.*, ¶ 13. In  
2 addition, on at least 20 occasions, Plaintiff joined Mr. Cordover for lunch while they were both  
3 working in the office on a Saturday. *Id.*, ¶ 15. Plaintiff even thought of himself as residing in  
4 Washington, D.C. when he sent an email to another individual describing himself as "the chief  
5 scientist of a small startup company in D.C., *my hometown.*" *Id.*, Ex. I (emphasis added).

6 **D. During His Employment, Plaintiff's Contacts With California Were Rare**  
7 **And Had No Connection To This Lawsuit.**

8 Plaintiff's employment with IT.com had virtually nothing to do with anyone or anything  
9 in California. *Id.*, ¶ 18. Rather, the majority of his business contacts were with persons in the  
10 Washington, D.C. area. *Id.*, ¶ 20. Plaintiff made one business trip to California while he was  
11 employed with IT.com and that was when he accompanied Mr. Cordover to a continuing learning  
12 and research conference held at Stanford University. *Id.*, ¶ 18. On another occasion, Plaintiff  
13 was in California on what he claimed was a business trip, but the purpose of his trip turned out to  
14 be unrelated to IT.com. During this trip, Mr. Cordover asked Plaintiff to go to a "get-to-know-  
15 you" meeting with a member of IT.com's advisory board, who resides in the Bay Area. *Id.*  
16 While Plaintiff may claim he made multiple trips to California on behalf of IT.com, none of these  
17 were trips authorized by the company. *Id.*

18 **E. Plaintiff Was Terminated In Washington, D.C.**

19 IT.com terminated Plaintiff's employment on December 12, 2006 for poor performance,  
20 unauthorized absences, and insubordination. *Id.*, ¶ 21. Mr. Cordover fired Plaintiff while  
21 Plaintiff was in IT.com's offices in Washington, D.C. *Id.* In fact, Mr. Cordover had to call the  
22 District of Columbia police to escort Plaintiff out of the office because Plaintiff refused to leave  
23 after repeated demands that he do so. *Id.* When Plaintiff was fired, IT.com took back the laptop  
24 computer that IT.com owned, but issued to Plaintiff to carry out his job duties during the course  
25 of his employment with IT.com. *Id.*, ¶ 24.

26 **F. The California Division of Labor Standards Enforcement Dismissed**  
27 **Plaintiff's Charge For Lack of Personal Jurisdiction.**

28 On February 16, 2007, Plaintiff filed a claim, pursuant to California Labor Code section  
98, with the Labor Commissioner of the State of California in the San Jose office for the Division

of Labor Standards Enforcement. *Id.*, Ex. J. Plaintiff's claim contained many of the same allegations that appear in this case: (1) alleged unpaid wages and (2) alleged unpaid business expenses for alleged business trips to California. *Id.* On March 20, 2007, the Labor Commissioner issued its Notice – Investigation Completed, dismissing Plaintiff's complaint for lack of jurisdiction. *Id.*, Ex. K. The Labor Commissioner found that the evidence provided by Plaintiff and IT.com, including the evidence listed above, "clearly showed Plaintiff was a resident of Virginia in 2006" and that Plaintiff's work in California "was limited to irregular business or recruiting trips, and it did not establish the type of presence in the state to provide Plaintiff the protections of California law." *Id.* The Labor Commissioner concluded that "Plaintiff does not have a sufficient basis to claim the protections of California law and should look to the state of Virginia or the District of Columbia for assistance in resolving this dispute." *Id.* (emphasis added).

**G. Despite The Labor Commissioner's Ruling, Plaintiff Initiated the Present Lawsuit in California State Court**

On or about September 28, 2007, Plaintiff filed a complaint in this action in the Superior Court of California for the City and County of San Francisco. On October 15, 2007, Plaintiff served the complaint via registered mail pursuant to California Code of Civil Procedure section 415.40. On November 26, 2007, Defendants timely removed the case to this court pursuant to 28 U.S.C. § 1441(a).

**III. ARGUMENT**

Pursuant to Federal Rule of Civil Procedure 12(b)(2), Defendants hereby move to dismiss this case for lack of personal jurisdiction. The constitutional protections of the due process clause require that jurisdiction not be exercised over a nonresident defendant unless the defendant has at least "minimum contacts" with the state such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).<sup>2</sup> The focus of the inquiry is whether the defendant's conduct and

<sup>2</sup> Where there is no federal statute governing personal jurisdiction, as in this case, the applicable law is the law of the state in which the court sits. *See* Fed. R. Civ. P. 4(k)(1)(A); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006). California's long-arm jurisdictional statute is coextensive with federal due process requirements, accordingly, the jurisdictional analysis under state law and federal due process

1 connection with the forum state is such that the defendant, “should reasonably anticipate being  
2 haled into court there.” *Id.*

3 Personal jurisdiction can be found in two ways: general jurisdiction or specific  
4 jurisdiction. Under either approach, Plaintiff bears the burden in establishing that this Court has  
5 jurisdiction over Defendants. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800  
6 (9th Cir. 2004). Plaintiff cannot prove either.

7 **A. This Court Does Not Have General Personal Jurisdiction Over Defendants.**

8 Defendants are not subject to general jurisdiction in California because their infrequent  
9 and minor contacts with California fall well short of the rigorous requirements for establishing  
10 general jurisdiction over a party. The standard for establishing general jurisdiction is an  
11 “exacting” one. *See Schwarzenegger*, 374 F.3d at 801. General jurisdiction exists where the  
12 defendant engages in “substantial” or “continuous and systematic general business contacts that  
13 approximate physical presence in the forum state.” *Id.* (internal citations omitted).

14 **1. ITC has no contacts with California.**

15 Plaintiff cannot show that defendant ITC has engaged in “substantial” or “continuous and  
16 systematic” contact with California to the level that approximates its physical presence in the  
17 state. To the contrary, ITC’s contacts with California are non-existent. Cordover Dec., ¶ 3. ITC  
18 is a privately held corporation, which was incorporated in the District of Columbia over 24 years  
19 ago. *Id.* Its principal place of business is in the District of Columbia. *Id.* ITC has no offices in  
20 California and it does not have an agent for service of process in California. *Id.* ITC does not  
21 lease or own real property in California, nor does it have any bank accounts in the state. *Id.* ITC  
22 has no employees residing in California. *Id.* ITC’s non-existent contacts with California do not  
23 meet the “exacting” standard necessary in order to give rise to general personal jurisdiction in  
24 California. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984) (no  
25 general jurisdiction over foreign corporation that sent officer to forum for one negotiating session,  
26 accepted checks drawn on a forum bank, purchased equipment from the forum, and sent  
27 personnel to the forum to be trained); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain*

28 are the same. *See* Cal. Civ. Proc. Code § 410.10; *Yahoo! Inc.*, 433 F.3d at 1205.

1 Co., 284 F.3d 1114, 1124 (9th Cir. 2002) (no general jurisdiction where defendant did not own  
 2 property in California, did not keep bank accounts or have employees in California, and did not  
 3 designate an agent for service of process in California).

4 **2. IT.com has only minor and infrequent contacts with California that do**  
 5 **not justify taking general jurisdiction over it.**

6 Similarly, defendant IT.com's contacts with California fall well short of "continuous and  
 7 systematic" contacts. Like ITC, IT.com is incorporated in the District of Columbia and is not  
 8 authorized to do business in California. Cordover Dec., ¶ 5. It has no offices in California. *Id.* It  
 9 does not lease or own real property in California. *Id.* IT.com has no bank accounts in California.  
 10 *Id.* It has no employees or officers residing in California. *Id.* It does not have a telephone within  
 11 California. *Id.* IT.com does not advertise in California. *Id.* IT.com does not have and has never  
 12 had any customers located in California. *Id.* IT.com's contacts with California amount to four  
 13 unsuccessful attempts at enlisting California customers, and the presence of IT.com's employees  
 14 at a research conference held in California. *Id.* At most, these contacts constitute attempting to  
 15 or actually "doing business *with* California, but do not constitute doing business *in* California."  
 16 *Glencore Grain Rotterdam B.V.*, 284 F.3d at 1125 (no general jurisdiction where defendant  
 17 exported considerable rice through the Port of San Francisco). Indeed, "engaging in commerce  
 18 with residents of the forum state is not in and of itself the kind of activity that approximates  
 19 physical presence within the state's borders." *Id.*

20 In sum, IT.com's contacts with California do not rise to the level that would cause it to  
 21 reasonably anticipate being haled into court in California. *See, e.g., Schwarzenegger*, 374 F.3d at  
 22 801 (no general jurisdiction where defendant regularly retains the services of a California-based  
 23 direct marketing company; has hired a sales training company, incorporated in California, for  
 24 consulting services; and maintains an Internet website accessible by anyone capable of using the  
 25 Internet); *Brand v. Menlove Dodge*, 795 F.2d 1070, 1073 (9th Cir. 1986) (no general jurisdiction  
 26 where defendant occasionally sold cars to California residents and to a dealer with knowledge  
 27 that the dealer occasionally resold them in California, including knowing the car at issue in the  
 28 litigation would be resold in California). Accordingly, this Court does not have general personal

jurisdiction over defendant IT.com.

**B. This Court Does Not Have Specific Personal Jurisdiction Over Defendants.**

Defendants are also not subject to specific jurisdiction in California. Specific jurisdiction is “based on the relationship between the defendant’s forum contacts and the plaintiff’s claim.”

*Yahoo! Inc.*, 433 F. 3d at 1205. It is analyzed according to a three prong test:

(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must be one which arises out of or relates to the defendant’s forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable.

*Id.* at 1205-06. Plaintiff has the burden of satisfying the first two prongs of the test. *See*

*Schwarzenegger*, 374 F.3d at 802. If the plaintiff fails “to satisfy either of these prongs, personal jurisdiction is not established in the forum state.” *Id.*

Here, all of Plaintiff’s claims arise out of his employment with IT.com, which took place exclusively in Washington, D.C. Plaintiff cannot proffer sufficient facts to establish that California has specific jurisdiction over any of the claims he asserts against Defendants.

**1. Plaintiff’s contract claim**

**a. Defendants did not purposefully avail themselves of California.**

Plaintiff’s First Cause of Action for Breach of Written Contract alleges that he had an agreement with Defendants for a three-year term of employment and that Defendants breached the agreement by prematurely terminating his employment without cause. Complaint, ¶ I.

In suits involving contracts, a “purposeful availment” analysis is often used. *Schwarzenegger*, 374 F.3d. at 802. Purposeful availment can be inferred “based on where the contract was negotiated, where the contract was executed, and where the contract was to be performed.” *Maxtor Corp. v. Read-Rite (Thailand) Co., Ltd.*, No. C-03-3064, 2003 WL 24902406, at \* 6 (N.D. Cal. Dec. 4, 2003). In this case, Defendants did not purposefully avail themselves of California because Plaintiff’s employment with IT.Com was negotiated in

1 Washington, D.C., he was offered employment while he was in Washington D.C., any agreement  
 2 was executed in Washington, D.C., and his employment was exclusively performed in  
 3 Washington, D.C.

4 (1) **Negotiations and final agreements all occurred in**  
 5 **Washington, D.C.**

6 IT.com (through its CEO, Mark Cordover) offered Plaintiff a position for employment  
 7 while Plaintiff was in Washington D.C. Cordover Dec., ¶ 8. All of the negotiations between  
 8 Cordover and Plaintiff regarding the key terms of his employment took place in Washington,  
 9 D.C. Cordover Dec., ¶ 8. At no point during the negotiations did Cordover ever set foot in  
 10 California. *Id.*

11 In addition, on his first day of work – December 1, 2005 – Plaintiff and IT.com entered  
 12 into a Restricted Stock Agreement. *Id.* at ¶ 11. While Plaintiff may contend in his First Cause of  
 13 Action that IT.com breached an agreement to employ Plaintiff for a three-year term, the Stock  
 14 Agreement provides, among other things, that in the absence “of an employment agreement, or of  
 15 a provision in such an agreement to the contrary, Participant acknowledges that he is an employee  
 16 at will.” *Id.*, Ex. C, ¶ 5. The Stock Agreement was entered into in Washington, D.C. and  
 17 includes a provision that it shall be construed according to the laws of the District of Columbia.  
 18 *Id.* at Ex. C, ¶ 12.

19 Plaintiff may argue that he initiated contact with IT.com when he responded to a job  
 20 posting on <http://washingtondc.craigslist.org>. Cordover Dec., ¶ 7. But, that is not enough to  
 21 establish specific jurisdiction. *See Johnston v. Frank E. Basil, Inc.*, 802 F.2d 418, 420 (11th Cir.  
 22 1986) (defendant’s placement of employment advertisement in an Alabama newspaper for  
 23 employment outside the forum did not qualify as purposeful availment); *Katerndahl v.*  
 24 *Brindenburg Securities*, No. C-96-2314, 1996 WL 743800, at \*4 (N.D. Cal Dec. 9, 1996)  
 25 (defendants advertisement in a trade journal circulated in California for a job outside of California  
 26 did not constitute purposeful availment). Indeed, IT.com’s advertisement was not focused on  
 27 California but was placed only in the Washington, D.C. section of Craigslist.org. Even if the  
 28 advertisement had been focused at California, employment advertisements alone do not rise to the



1 level of purposeful availment. *Id.*

2 To the extent that Plaintiff attempts to argue that any negotiations may have occurred over  
3 the phone while he was in California, that is still insufficient to justify personal jurisdiction over  
4 the Defendants. *See Markey v. Kudelski S.A.*, No. 06-CF-1300, 2007 WL 1110787, at \*4 (S.D.  
5 Cal. April 3, 2007) (“Use of the mails, the telephone . . . or other international communications  
6 simply do not qualify as purposeful activity invoking the benefits and protections of the forum  
7 states.” quoting *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985)); *see Katerndahl*, 1996  
8 WL 743800, at \*4 (negotiations of the employment contract that took place on the phone while  
9 the plaintiff was in California and in person in New York and Denmark did not create personal  
10 jurisdiction); *see also McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 816 (9th Cir. 1988)  
11 (execution of contract in California insufficient where substance of the relationship formed in  
12 England).

13 In sum, IT.com’s actions in interviewing and negotiating with Plaintiff in Washington,  
14 D.C., for a job to be performed in Washington, D.C. simply do not rise to the level or purposeful  
15 availment. *See Markey*, No. 06-CF-1300, 2007 WL 1110787, at \*4 (refusing to exercise  
16 jurisdiction over the defendant out-of-state employer even though the defendant made an  
17 employment offer to plaintiff during negotiations while plaintiff was present in California).

18 (2) **The course and scope of Plaintiff’s employment**  
19 **occurred in Washington, D.C.**

20 A litany of evidence demonstrates that the parties intended the course and scope of  
21 Plaintiff’s employment to occur in Washington, D.C., and, in fact, Plaintiff performed his duties  
22 exclusively in Washington, D.C. *See supra*, II.A-G. Indeed, evidence submitted by Defendants  
23 in support of this motion contains a substantial number of admissions by Plaintiff regarding the  
24 location of his employment with IT.com. For example, in Plaintiff’s email correspondence with  
25 an employee of another company, Plaintiff states that “I am the chief scientist of a small startup  
26 company in DC, *my hometown*.” *Id.*, Ex. I (emphasis added). Defendants have also submitted  
27 several tax and other official documents wherein Plaintiff admits that he resides and is employed  
28 in the Washington, D.C. area. Cordover Dec., Exs. D-I.



1 In fact, Plaintiff's own complaint is internally inconsistent and, by implication, admits that  
 2 Plaintiff worked and resided in the Washington, D.C. area during his employment with IT.com.  
 3 On the one hand, Plaintiff alleges that he was a resident of California "at all times mentioned"  
 4 within the complaint and that the employment agreement he had with IT.com "was to be  
 5 performed in the City and County of San Francisco." Complaint ¶ I. On the other hand, Plaintiff  
 6 alleges that he was promised "reimbursement for his travel and related expenses for three  
 7 business trips to San Francisco per year" and seeks through this action reimbursement for travel  
 8 expenses incurred traveling from Washington, D.C. *Id.* ¶ IV, V. How can Plaintiff claim that he  
 9 was employed exclusively in California when he seeks reimbursement for alleged business travel  
 10 to California? That makes no sense. Indeed, given the substantial evidence that Plaintiff resided  
 11 and worked outside of California, Defendants believe that Plaintiff knew that the allegations in  
 12 the Complaint are not likely to have evidentiary support at the time he filed the Complaint. *See*  
 13 Federal Rule of Civil Procedure 11.

14 Plaintiff may also claim in opposition to this motion that he made a couple business trips  
 15 to California, which somehow creates personal jurisdiction over Defendants. For example,  
 16 Plaintiff attended a research conference held in Santa Clara County and he visited a member of  
 17 IT.com's advisory board, who is also located in Santa Clara County. However, that is insufficient  
 18 to establish that his causes of action arise out of any of Defendants' contacts with California. *See*  
 19 *U.S. Vestor, LLC v. Biodata Info. Tech. AG*, 290 F. Supp. 2d 1057, 1065 (N.D. Cal. 2003)  
 20 (jurisdiction does not attach merely because officer of the company visited California on business  
 21 trips); *Hydrokinetics, Inc. v. Alaska Mech., Inc.*, 700 F.2d 1026, 1029-1030 (5th Cir. 1983)  
 22 (finding no purposeful availment by defendant corporation even though officers of the  
 23 corporation visited the forum state twice).

24 **b. Plaintiff's contract claim does not arise out of or relate to**  
 25 **Defendants' contacts with California.**

26 Even if Plaintiff could somehow establish purposeful availment, he still has the burden to  
 27 establish that his breach of contract claim arises out of or relates to IT.com's activities in  
 28 California. *See Yahoo! Inc.*, 433 F. 3d at 1205. According to Plaintiff, the alleged breach

1 occurred in *Washington, D.C.* when he was terminated from his employment. Complaint, ¶¶ V,  
 2 VI; Cordover Dec., ¶ 21. In particular, Mr. Cordover fired Plaintiff for cause on December 12,  
 3 2006 at IT.com's office in Washington, D.C. Cordover Dec., ¶ 21. In fact, Plaintiff refused to  
 4 leave IT.com's offices until after the police arrived and escorted him out. *Id.*

5 Any alleged business trips Plaintiff or anyone at IT.com took to California, and any  
 6 communications Plaintiff had with California residents, do not relate to Plaintiff's termination. In  
 7 fact, Plaintiff does not even allege that Defendants' contacts with California resulted in his  
 8 termination. Therefore, Plaintiff's breach of contract claim does not arise from California-related  
 9 activities, and this Court does not have specific jurisdiction over Defendants. *See Katerndahl*,  
 10 1996 WL 743800, at \* 6 (plaintiff's claim for breach of contract and violation of public policy did  
 11 not arise from any California activities because the termination occurred in Denmark, not  
 12 California).

13 **c. It would be unreasonable for this Court to assert jurisdiction.**

14 It would be unreasonable for California to assert jurisdiction over Defendants. In  
 15 determining reasonableness, the Ninth Circuit considers seven factors: (1) the extent of the  
 16 defendant's purposeful injection into the forum state's affairs; (2) the burden on the defendant of  
 17 defending in the forum; (3) the extent of the conflict with the sovereignty of the defendant's state;  
 18 (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution  
 19 of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and  
 20 effective relief; and (7) the existence of an alternative forum. *See Brand*, 796 F.2d at 1075.

21 In this case, as set forth fully above, Defendants did not purposefully inject themselves  
 22 into California's affairs to any extent. Further, there is a tremendous burden on Defendants to  
 23 defend this action in California. Not only are the defendant corporations based in Washington,  
 24 D.C., all of their witnesses reside in the Washington, D.C. area. Cordover Dec. ¶ 25. Both  
 25 defendants are small companies and defending this action in California would require an  
 26 enormous expense of time and money, both of which are at a premium for Defendants. In  
 27 addition, there may be a conflict with the sovereignty of Washington, D.C. if the court assessed  
 28 ITC's and IT.com's conduct under the light of California law. California has no interest in

1 adjudicating this dispute between a Washington, D.C. employer and its employee, who was a  
 2 resident of Washington, D.C. at the time of his employment. Simply because Plaintiff allegedly  
 3 resided in California prior to his employment and after his termination, does not mean that  
 4 California has an interest in adjudicating the dispute.

5 The only connection between California and this case is that Plaintiff happens to currently  
 6 reside in California. However, the alleged causes of action arose in Washington, D.C. and all of  
 7 the witnesses reside in Washington, D.C. It would be far more efficient and effective for Plaintiff  
 8 to pursue this action in a Washington, D.C. court, which is certainly available to him.

9 Considering all of the factors set forth by the courts, it is clear that California does not  
 10 have specific personal jurisdiction over ITC and IT.com with respect to Plaintiff's breach of  
 11 contract claim. The California Labor Commissioner dismissed Plaintiff's charge for this reason;  
 12 this Court should do so as well.

13 **2. Plaintiff's tort claims have no connection to California.**

14 **a. Plaintiff's conversion claim.**

15 Plaintiff's complaint alleges two intentional tort causes of action. The first is for  
 16 conversion, in which he alleges that he owned a laptop computer and Defendants converted the  
 17 computer to their own use and benefit. Complaint, ¶¶ XI, XIII.<sup>3</sup> Typically, in the context of tort  
 18 causes of action, the first prong of the specific jurisdiction analysis is whether the defendant  
 19 "purposefully direct[ed] his activities at the forum state." *Yahoo! Inc.*, 433 F.3d at 1206. The  
 20 courts apply an "effects" test, which imposes three requirements: "(1) [the defendant] committed  
 21 an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant  
 22 knows is likely to be suffered in the forum state." *Id.* at 1207.

23 Defendants assume the laptop Plaintiff is referring to in his conversion claim is the laptop  
 24 IT.com owned, but loaned to Plaintiff for his use during and in the scope of his employment with  
 25 IT.com. When Plaintiff's employment was terminated, IT.com re-took physical possession of the  
 26 laptop on December 12, 2006, in Washington, D.C.

27 <sup>3</sup> Plaintiff's Complaint, ¶ XIII alleges that Defendants "converted" the laptop to their own use on December 19, 2006,  
 28 but Mr. Cordover re-took possession of the laptop when he fired Plaintiff on December 12, 2006. Cordover Dec., ¶  
 24.

1 California has no connection to Plaintiff's conversion claim.<sup>4</sup> Even if Plaintiff did own  
 2 the laptop at issue, it was located in Washington, D.C. and it was in Washington, D.C. where Mr.  
 3 Cordover re-took possession of it. The alleged resulting harm was felt in Washington, D.C.  
 4 because that is where Plaintiff resided at the time. California's only relationship to the  
 5 conversion claim is that Plaintiff chose to move to California after the alleged conversion.

6 Plaintiff also cannot establish the second prong of the specific jurisdiction test. Plaintiff's  
 7 conversion claim did not arise out of any of Plaintiff's alleged business trips to California or  
 8 IT.com's contacts with California. Similarly, the reasonableness prong of the specific jurisdiction  
 9 analysis weighs heavily against California asserting jurisdiction, as set forth above in the  
 10 discussion of Plaintiff's contract claims. *See supra* II, B, 1, c.

11 Accordingly, the facts clearly show that Plaintiff cannot establish that California has  
 12 specific jurisdiction over IT.com with respect to his conversion claim.

13 **b. Plaintiff's fraud claim**

14 Plaintiff's second intentional tort claim for fraud arises out of Plaintiff's alleged  
 15 employment agreement with IT.com on the grounds that Defendants allegedly offered him a three  
 16 year employment agreement without any intention of performance and with the intent to defraud  
 17 Plaintiff. Complaint ¶¶ XVI, XVII. The key facts surrounding Plaintiff's fraud claim are  
 18 identical to those surrounding the breach of contract claim. *See supra* II, B, 1, c.

19 As explained above, IT.com's intentional act of offering Plaintiff employment, which  
 20 Plaintiff claims included a three-year contract, took place in Washington, D.C. Further, this  
 21 alleged act was not expressly aimed at California because it occurred in Washington, D.C., and  
 22 the alleged agreement was to be performed in Washington, D.C. Even if the alleged fraud  
 23 occurred when Mr. Cordover emailed Plaintiff on November 26, 2005, that alone is not enough to  
 24 confer specific jurisdiction in California. *See Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1248 (9th  
 25 Cir. 1984) (mere fact that defendant communicated with plaintiff in the forum state and may have  
 26 committed a tort in the exchange of correspondence does not confer specific jurisdiction).

27 <sup>4</sup> A cause of action for conversion requires that the plaintiff owns or has a right to possess the property; defendant's  
 28 wrongful act toward the property which interferes with the plaintiff's possession; and harm to the plaintiff. *See*  
 Restatement (Second) of Torts § 220A-223 (1965)

1 Plaintiff also cannot establish that his claim for fraud arises out of the Defendants' alleged  
 2 California activities. IT.com's alleged business activities and Plaintiff's visits to California are  
 3 unrelated to Plaintiff's fraud claim. Any alleged fraud relating to the term of the employment  
 4 agreement took place in Washington, D.C. In addition, as set forth above, it would not be  
 5 reasonable for California to exercise jurisdiction over Plaintiff's claims. *See supra* II.B.1.c.

6 **3. Plaintiff's claim for unpaid wages has no connection to California.**

7 Plaintiff asserts a claim for unpaid wages for the month of December 2006, in addition to  
 8 resulting waiting time penalties, presumably under California Labor Code Section 203.  
 9 Complaint ¶¶ IX, X. Because this is a statutory claim, it does not fit neatly into the Ninth  
 10 Circuit's contract/tort distinction for personal jurisdiction. At least one court has applied the  
 11 purposeful availment test in an unpaid wage claim. *See Bury v. Northern Outfitters, LLC*, No. 06-  
 12 3081, 2007 WL 1431958, at \*3 (D. Or. May 14, 2007). Under either test, however, Plaintiff  
 13 cannot establish that California has specific personal jurisdiction over Defendants.

14 Like all of his other claims, Plaintiff's claim for unpaid wages for December 2006 arises  
 15 out of his employment with IT.com in Washington, D.C. To find that Defendants purposefully  
 16 availed themselves of the privilege of doing business in California, Plaintiff must provide  
 17 evidence of Defendants' actions in California such that they invoked the benefits and protections  
 18 of its laws. *See Schwarzenegger*, 374 F.3d at 802. As fully set forth above, Defendants did not  
 19 do business in California and did not engage in any activity that would expect them to be haled  
 20 into a California court. *See supra* II.B.1.a.

21 To find that Defendants purposefully directed their conduct towards California, Plaintiff  
 22 must establish that they committed an intentional act, purposefully aimed at California, that  
 23 caused harm they knew would likely be suffered in California. *See Yahoo! Inc.*, 433 F.3d at  
 24 1207. For this claim, the intentional act would have to be IT.com's alleged failure to pay Plaintiff  
 25 for the month of December 2006. Considering IT.com and Plaintiff were both residents of the  
 26 Washington, D.C. area at the time and Plaintiff worked in Washington, D.C. throughout his  
 27 employment, it cannot be said that this alleged act was purposefully aimed at California. Further,  
 28 because IT.com knew Plaintiff resided in Virginia at the time, it could not have known that any

1 harm in allegedly not paying Plaintiff's salary would be suffered in California. The harm, if any,  
2 would have been suffered in the Washington, D.C. area.

3 In addition, Plaintiff cannot establish that his claim for unpaid wages arises out of any of  
4 Defendants' activities in California. Plaintiff's claim arises out of his employment in  
5 Washington, D.C., and did not arise "but for" Defendants contacts with California. *See Bury*,  
6 2007 WL 1431968, at \* 4. For the factors set forth above, it would be unreasonable for California  
7 to exercise jurisdiction over this claim for wages not paid in Washington, D.C. by a Washington,  
8 D.C. employer. *See supra* § II, B, 1, c.

9 Accordingly, like the California Labor Commissioner, this Court should dismiss  
10 Plaintiff's claim for unpaid wages for lack of personal jurisdiction.

11 **C. In the Alternative, This Case Should be Transferred to the District of**  
12 **Columbia**

13 This Complaint should be dismissed with prejudice. However, if the Court declines to  
14 grant Defendants' Motion to Dismiss, the Court should transfer venue of Plaintiff's action to the  
15 United States District Court for the District of Columbia. Venue in federal court may be  
16 transferred when doing so furthers the interests of justice. "For the convenience of the parties and  
17 witnesses, in the interest of justice, a district court may transfer any civil action to any other  
18 district court or division where it might have been brought." 28 U.S.C. § 1404(a). Pursuant to  
19 this statute, the courts consider: (1) the plaintiff's choice of forum; (2) the convenience of the  
20 witnesses and the parties; (3) local interest in the issue; (4) other factors including judicial  
21 economy. *See Flores v. Zale Delaware, Inc.*, No. C07-0539, 2007 WL 4462992, at \*2 (N.D. Cal.  
22 Dec. 17, 2007). Assuming the Court decides not to completely dismiss this case, then all of these  
23 factors lie in favor of transferring this case to the District of Columbia.

24 **1. Plaintiff's choice of forum has no weight.**

25 Plaintiff's choice of forum is not entitled to much, if any, weight in this case because his  
26 choice of forum is improper. *See Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1157 (S.D. Cal.  
27 2005) (plaintiff's choice receives less deference "where the action has little connection with the  
28 chosen forum"); *Boyd v. Snyder*, 44 F. Supp. 2d 966, 970 (N.D. Ill. 1999) ("When the conduct

1 and events giving rise to the cause of action did not take place in the plaintiff's selected forum,  
 2 the plaintiff's preference has minimal value even if it is his home forum.") (quotations and  
 3 citations omitted). As discussed above, all of the operative facts of Plaintiff's complaint arose in  
 4 the Washington, D.C. area and have no significant connection to California. Further, Defendants  
 5 are both residents of Washington, D.C. Plaintiff could have and should have brought this action  
 6 in the District of Columbia.

7 **2. Washington, D.C. is more convenient for the parties and witnesses.**

8 Plaintiff is the only principal witness to his contract negotiations with, and his  
 9 performance at, IT.com who resides in California. All of the other principal witnesses reside in  
 10 the Washington, D.C. area:

11 (1) Mr. Cordover is located in the Washington, D.C. area, and will testify regarding  
 12 the discussions he had with Plaintiff regarding his employment with IT.com, Plaintiff's  
 13 performance at his job with IT.com, Plaintiff's termination, and the fact that IT.com owned the  
 14 laptop computer at issue in Plaintiff's conversion claim.

15 (2) Mr. Jason Pratt, an IT.com employee, is located in the Washington, D.C. area, and  
 16 will testify concerning Plaintiff's job performance and the events surrounding his termination.

17 (3) Mr. Andy Liu, an IT.com employee, is located in the Washington, D.C. area, and  
 18 will testify concerning Plaintiff's job performance and the events surrounding his termination.

19 (4) Mr. Seth Green, an IT.com employee, is located in the Washington, D.C. area, and  
 20 will similarly testify concerning Plaintiff's job performance and the events surrounding his  
 21 termination.

22 (5) Ms. Coco Palomeque, the Secretary of IT.com, is located in the Washington, D.C.  
 23 area, and will testify concerning Plaintiff signing the Restricted Stock Agreement, and his  
 24 presence in the Washington, D.C. area during many weekends from December 2005 to December  
 25 2006.

26 "The relative convenience to the witnesses is often recognized as the most important  
 27 factor to be considered in ruling on a motion under § 1404(a)." *Saleh*, 361 F. Supp. 2d at 1160.  
 28 If this case proceeds in the Northern District of California, all five of the above listed witnesses



1 would be required to spend at least one day traveling to California for trial, at least one day spent  
2 testifying, and then another day traveling back to Washington, D.C. Additionally, IT.com is a  
3 small start-up company with only a handful of employees. It would be detrimental to IT.com's  
4 ongoing business activities to have its CEO, its Secretary, and three other employees travel all the  
5 way to California to testify about facts that occurred in the Washington, D.C. area. It is much  
6 more convenient for all the parties involved to have this case tried in the District of Columbia.

7 **3. The Northern District of California Has No Interest in These Claims**

8 This case involves claims against a Washington, D.C. employer, brought by a former  
9 employee who resided in the Washington, D.C. area during his employment. The District of  
10 Columbia clearly has a superior interest in resolving Plaintiff's claims. California has no  
11 connection to this dispute save that Plaintiff resided in the state before he worked for IT.com, and  
12 after he was terminated from IT.com.

13 **4. Judicial Economy Favors Transfer of Venue**

14 The efficient administration of justice and judicial economy also dictate that Washington,  
15 D.C. is the better forum for this action. As set forth above, the witnesses are located in  
16 Washington, D.C., both defendants are located in Washington, D.C. Further, the docket  
17 congestion in the Northern District of California is far greater than that in the District of  
18 Columbia. Declaration of Michael D. Weil, Ex. B. For example, in the twelve month period  
19 ending March 31, 2007 (the most recent statistics available), there were 8,294 cases filed and  
20 9,010 cases pending in the Northern District of California, while there were only 2,768 cases filed  
21 and 4,180 cases pending in the District Court for the District of Columbia. Thus, the relative  
22 docket congestion in the Northern District of California far exceeds that in the District of  
23 Columbia, and this factor also weighs in favor of transferring the action to the District of  
24 Columbia.

25 Accordingly, both in number and in substance, the factors supporting transfer of venue  
26 greatly outweigh any arguments against such a transfer and this Court should exercise its power  
27 under 28 U.S.C. §1404(a) to transfer this action to the proper forum.  
28



1 **IV. CONCLUSION**

2 For all the foregoing reasons, defendants ITC and IT.com respectfully request that the  
3 Court dismiss this action, with prejudice, for lack of personal jurisdiction. In the alternative,  
4 Defendants respectfully request that the Court transfer the action to the United States District  
5 Court for the District of Columbia.

6  
7 Dated: January 7, 2008

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9  
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